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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS

The Petitioner files this brief in reply to the Brief for the Respondents.

Statement

The Respondents have mentioned two points in the Brief of the Petitioner they feel are inaccurate. Both of these points have to do with what is presented "in the record." Petitioner feels that this Court can take judicial notice of the scope of authority the Bureau of Indian Affairs of the Department of the Interior exercises over all activities of Indian tribes. See 25 U.S.C. 1(a) and 25 U.S.C. 2.

As to the second contention, the Petitioner would point out that 25 C.F.R. pt. 91 is the regulation codifying 25 U.S.C. 470; 25 U.S.C. 470 has been stipulated to by both parties as the source of funds used in the ski area's development (App. 4), and it would logically follow that the regulations promulgated to control those funds may be considered by this Court in determining this case.

These are small points, but the Petitioner did wish to comment on these as the Respondents have continually attempted to limit the scope of the Stipulation of Facts. The Stipulation of Facts is the framework in which the case is placed, but it does not remove obvious facts from the consideration of the Court. By way of example, the application of 25 U.S.C. 470 as stipulated to by the parties; the Tribe feels that the Court can turn to regulations and other statutes that implement that one section, such as 25 U.S.C. 465, 25 U.S.C. 476 and 25 C.F.R. pt. 91. The stipulation as to one fact does not strip the Court of judicial notice or judicial curiosity as to facts and statutes that stand *in pari materia* with the facts stipulated upon by the parties.

Argument

I

THE STATE OF NEW MEXICO HAS NO AUTHORITY TO TAX THE MESCALERO APACHE TRIBE BECAUSE THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER THE TRIBE.

The Brief of the Petitioner indicates that 25 U.S.C. 465 and 470 compliment the Enabling Act to exempt an Indian tribe from State taxation. Further construction of the Enabling Act [Ch. 310, Sec. 2, Cl. 2, 36 Stat. 557 (1910)] indicates the Act precludes taxation of this particular tribal activity. The Enabling Act refers to Indians and Indian tribes at several points; yet the language relied upon by the Respondents states ". . . held by any Indian, . . ." The Petitioner would suggest this refers to individual Indians and not organized tribes. The Petitioner would state that Congress has specifically shown that it intends to exercise control over Indian tribes. Where Congress has the power and authority to control Indians, any relinquishment of that authority must be by very specific intent. *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512 (1940); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir., 1957). It should also be recalled that this Court has consistently held that Indian tax immunity provisions should be liberally construed in favor of the immunity. *Choate v. Trapp*, 224 U. S. 665, 675 (1912). Therefore, the phrase relied upon by the Respondents must be strictly construed and would not include a tribal activity of an Indian tribe.

The Enabling Act placed the State of New Mexico on the same restricted taxing basis as other states in the union. See *The Kansas Indians*, 5 Wall. 737, 755-757; *The New York Indians*, 5 Wall. 761, 771. The act states "except . . . to such extent as Congress has prescribed or may hereafter prescribe". The Congress has prescribed such an exemption, 25 U. S. C. 465.

The operation of the ski area is a governmental

function of the tribe; the revenue is going to meet educational, social and economic needs of the Mescalero Apache people - a basic function of a government (App. 3-4). This development enhances productivity and creates opportunities for social and economic advancement.

Even assuming for the sake of argument that the ski area operation is a proprietary function, cases have consistently held that such a factor is not relevant in determining tribal immunity. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. [illegible], 443 P.2d 421, 423 (1968); *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940); *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 381 F.2d 517 (5th Cir., 1966). The theory developed by all these cases indicates no relevant difference between proprietary and governmental functions when dealing with Indian tribes. The guardian-ward relationship places the function, whatever it may be, under the protection of the federal government. By enacting 25 U.S.C. 470, Congress is stating that such activities, whether governmental or proprietary, are fulfilling a goal of federal Indian policy and are thereby exempt.

The Petitioner's reliance on *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 754 (9th Cir., 1971) is to show the broad scope of the tax exemptions mentioned in 25 U.S.C. 465; only a general inference is made to 25 U.S.C. 470 - through the Indian Reorganization Act. As indicated in the Brief of the Petitioner, the properties acquired in *Stevens* had varying statuses of ownership. The *Stevens* case shows the interrela-

tionship between several statutes that together create an exemption. Placing statutes *in pari materia* in the present case shows the intent of Congress to create exemptions for tribal activities from state taxes. The main thrust of *Stevens* is to emphatically demonstrate the wide scope of 25 U.S.C. 465 and to show it is an integral part of statutory interpretation which results in tax exemptions for Indian-held interests and income from those interests. The land and improvements in the present case are an integral package, together they compose the ski resort. The taxing of any one portion would affect the whole ski complex. The intent of § 470 is to create economic growth, and just as the income in the *Stevens* case was determined to be exempt, the statutes applicable to the present case create an exemption from gross receipts and personal property use tax.

The Respondents rely on *Oklahoma Tax Commission v. Texas Co.* 336 U. S. 342 (1949) in portions of their brief (Respondents' Brief, pp. 9, 12, 14). Oklahoma Indians have had a limited status for sometime; this is due to the destruction of tribal sovereignty, allotment and the actual intergration of Indians into the main stream of Oklahoma society. This distinction has been pointed out in *Oklahoma Tax Commission v. United States*, 319 U. S. 598, 603 (1943). The various Indian Tax cases out of Oklahoma are not only limited because of the unique situation of Oklahoma Indians, but also have been placed in question by the holding of this Court in *Squire v. Capoeman*, 351 U. S. 1 (1956). *Squire* stands for the proposition that Congress should affirmatively authorize tax-

ability, thereby not leaving the door open to the states to tax unless specifically allowed by Congress. This would leave the burden on the state to indicate specific authority from Congress to tax Indian tribes. The role of *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342 (1949), has been placed in further question by the recent Court of Claims decision, *Mason v. United States*, No. 417-70 (Ct. Cl. June 16, 1972):

> "Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire v. Capoeman* . . . . The *West - Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their tests reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the Judicial climate has changed to concentrate, not on a relationship of Indian tax immunity to other exemptions, *but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.*" (Emphasis added.)

II
THE STATE OF NEW MEXICO CANNOT TAX THE MESCALERO APACHE TRIBE BECAUSE SUCH A TAX WOULD INTERFERE WITH THE RIGHT TO SELF-GOVERNMENT.

The Respondents indicate that the Tribe should wait until it has been completely destroyed to determine if it has suffered any damage. As indicated many times, the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). The State of New Mexico is not only applying their taxes to the Tribe and thereby jeopardizing the very structure of the Tribe, they are usurping a right of the Tribe to control taxation on the reservation. See *Morris v. Hitchcock*, 21 App. D. C. 565, 593 (1903), affirmed 194 U. S. 384 (1904).

Both parties have cited *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). The Petitioner has cited the *Kake* case for the general proposition that the state cannot interfere with the rights of self-government or impair rights granted or reserved by the federal government (369 U.S. 60, 75) (Petitioner's Brief p. 25); the Respondents cite the case for the proposition that the facts of *Kake* indicate that tribal self-government was not interfered with in that case and therefore tribal self-government would not be interfered with in the present case (Respondents' Brief p. 13). The facts of *Kake* must be limited in light of recent decisions and in light of federal legislation. It should be noted that the *Kake* case is from the State of Alaska and Alaska is a Public Law 280 State (67 Stat. 588, 18 U. S. C. 1162, 28 U. S. C. 1360). As indicated previously, New Mexico is not a Public Law 280 State and has not assumed jurisdiction under methods outlined in specific federal legislation for assumption of jurisdiction. See also, 25 U. S. C. 1321-1326. The scope of *Kake* must also be interpreted in light of later holdings that statutory means are the

exclusive method of assuming jurisdiction on the part of the State. *Kennerly v. District Court of Montana*, 400 U. S. 423 (1970).

The danger is a real and current one. The interference is real because it restricts the Tribe in the operation of the enterprise and hampers the use of revenue for tribal improvement projects.

The State of New Mexico must feel that it can now interfere with on-reservation Indian activities. In Attorney General Opinion No. 72-23, May 8, 1972, the present case is cited for the following proposition: "These cases clearly establish that Indians on Indian lands can lawfully be subject to taxation by state authorities without necessarily interfering with any right of self-government or impairment of any rights granted or reserved to them by the federal government." The State of New Mexico is now saying they can intervene on Indian lands to tax Indian efforts; such a step is an obvious interference with the right to self-government and would lead to Indian tribal destruction. The Respondents advise on the one hand that their tax efforts are not interfering with tribal sovereignty, while issuing opinions that say the door is open to destroy the tribal structure. These are the very practices the Indian Reorganization Act was designed to prevent.

III

THE MESCALERO APACHE TRIBE IS EXEMPT FROM NEW MEXICO TAXES BECAUSE IT IS A FEDERAL INSTRUMENTALITY

The Respondents continually cite *Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), dissenting opinion. It should be noted that the majority found the exemption to apply and that the bank was immune as a federal instrumentality from the sales and use taxes. Though not in point as to the Indian question involved here, the pattern developed is similar because an Act of Congress granting immunity from state taxes was in question and this Court found the states to be without power to tax federally created entities. This immunity is based on the fact that these institutions are performing federal government functions and are therefore virtual arms of the government. Even applying the tests referred to by the Respondent, the Tribe meets those standards. The Tribe is organized under an Act of Congress, is fulfilling government duties established by treaty and statute, and is an integral part of a government department - the Department of the Interior. This test jells in light of specific federal Indian policy whose announced goal is ". . . maximizing opportunities for Indian control and self-determination." Senate Congressional Resolution 26, 92nd Congress, December 11, 1971.

The Tribe would point out it is not doing business with the United States government; rather the operation of the ski area is a business utilized for meeting federal Indian policies of maximizing economic self-sufficiency.

The Respondent cites a section from *Federal Indian Law*, U. S. Government Printing Office (1958), at page 16 of Respondents' Brief. The Petitioner would

state that it is organized to carry out governmental objectives (25 U.S.C. 476), and is operating under all applicable sections of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984-988.

Conclusion

The confrontation in this case is between a federal policy of fostering economic development of the American Indians and the taxing power of the State of New Mexico. The federal government has established programs to help Indian tribes reach economic and social goals molded by the Indians themselves. The action of the State of New Mexico is not only a limitation on a sovereign Indian tribe, but is a limitation on the federal government and its stated federal policy. The request of the Mescalero Apache Tribe is that it be allowed to move toward goals of economic and social self-sufficiency without interference from the State of New Mexico. The judgment of the New Mexico Court of Appeals should be reversed.

Respectfully submitted,

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